Royaya bte Abdullah & Anor v Public Prosecutor

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 42–49 OF 2002
HELILIAH MOHD YUSOF J
19 JANUARY 2004

Criminal Procedure — Bail bond — Forfeiture — Accused absconded — Whether sufficient cause shown — Whether amount to be forfeited

The two bailors stood surety for one Novel Michael Thomas for the amount of RM10,000. When the accused failed to turn up in court, the session court judge had ordered that the sum of RM5,000 be forfeited and the balance returned to the first bailor. Dissatisfied, they appealed.

Held, allowing the appeal:

(1) The breach of the bond must be viewed on a material date, the date being 5 September 2001 when the bailors knew that they had to be present in court on 5 September 2001 and still had the responsibility of securing or at least attempting to secure the attendance. However, it is noted that prior to 25 July 2001 the bailors had made attempts to remind the accused of his attendance. The first appellant had completely entrusted her belief on the second appellant that the accused was a reliable person (see para 42).

(2) The delay had also been caused by the various interlocutory applications for revision and hearing on preliminary objections which gave the accused even greater opportunity to abscond. Therefore it is proper to ask whether sufficient reason had been shown. There are circumstances to consider what a fair amount is to be forfeited. The first appellant being bound should realise that the obligation of a surety is very serious. However the rights of the bailors could be mitigated by the circumstances that on record there was also delay in the warrant of arrest being issued. The matter is unfortunate as some of the delay is not attributed to the bailors' efforts (see para 44).

(3) The amount of RM5000 that has been forfeited be set aside and be substituted with an amount of RM2500. The first appellant is therefore to be refunded for the amount of RM2500 (see para 45).

[**Bahasa Malaysia summary**

Dua orang bailor bertindak sebagai penjamin untuk Novel Michael Thomas bagi jumlah RM10,000. Apabila tertuduh gagal untuk hadir di mahkamah, hakim mahkamah sesyen telah memerintahkan agar jumlah RM5,000 dirampas

dan baki dipulangkan kepada bailor pertama. Berasa tidak puas hati, mereka telah merayu.

Diputuskan, membenarkan rayuan tersebut:

(1) Perlanggaran bon hendaklah diteliti pada hari matan, iaitu pada 5September 2001 apabila bailor-bailor tersebut mengetahui mereka dikehendaki hadir di mahkamah pada 5 September 2001 dan masih mempunyai tanggungjawab untuk hadir atau sekurang-kurangnya cuba untuk hadir di mahkamah. Namun begitu, sebelum 25 Julai 2001 bailor-bailor tersebut telah berusaha untuk mengingatkan tertuduh berhubung kehadirannya. Mahkamah berpendapat bahawa perayu pertama meletak kepercayaan sepenuhnya ke atas perayu kedua yang tertuduh adalah seorang yang boleh diharap (lihat perenggan 42).

(2) Kelewatan itu juga disebabkan oleh pelbagai permohonan interlokutori untuk kajian semula dan perbicaraan berhubung bantahan awal telah memberikan lebih peluang kepada tertuduh untuk melarikan diri. Oleh itu adalah betul untuk bertanya sama ada alasan yang mencukupi telah diberikan. Wujud keadaan untuk meneliti jumlah adil yang patut dirampas. Perayu pertama yang terikat sepatutnya menyedari bahawa tanggungjawab penjamin adalah suatu yang serius. Namun begitu hak-hak bailor tersebut boleh dimitigasikan oleh keadaan-keadaan yang atas rekod terdapat juga kelewatan dalam pengeluaran waran tangkapan. Perkara ini dikesali kerana kelewatan ini bukan salah bailor-bailor tersebut keseluruhannya. (lihat perenggan 44).

3) Jumlah RM5000 yang dirampas untuk diketepikan dan digantikan dengan jumlah RM2500. Perayu pertama oleh itu telah dibayar balik dengan sejumlah RM2500 (lihat perenggan 45).]

Notes

For cases on bail bond forfeiture, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 872–889.

Cases referred to

Fateh Chand Wadhumal v Emperor 41 Cr LJ 802 (refd)
Khor Ewe Suan v PP [1964] MLJ 220 (refd)
PP v Chou Tai Chuan [1988] 1 MLJ 511 (refd)
Rv Knightsbridge Crown Court [1980] Cr LR 715 (refd)
R v Waltham Forest Justises; ex p Parfrey [1980] Cr LR 571 (refd)
Ramlee v PP [1969] 1 MLJ 42 (refd)

Legislation referred to

Criminal Procedure Code ss 393(1),(4), 404(1)
Penal Code s 420

Saiful Hazmi (Deputy Public Prosecutor) (Attorney General's chambers) for the appellants.
Edmund Bon (Chooi & Co) for the respondent.

Heliliah Mohd Yusof J:

APPEAL

[1] The appellants were bailors and are appealing against the sessions court judge's order that a sum of RM5,000 out of RM10,000 bail amount be forfeited.

SUMMARY OF THE CASE

[2] The accused, (Novel Michael Thomas) was charged at the sessions court for two charges of cheating under s 420 of the Penal Code which the two appellants stood as sureties. The sum of RM10,000 was deposited in the sessions court as security of the bail bond.

[3] On 19 April 2001, the defence counsel raised a preliminary objection on the ground that the ACA has no *locus standi* to institute charges under s 420 of the Penal Code as the offence under the Anti Corruption Act 1997 or a prescribed offence under the Act. The learned sessions court judge reserved decision on 20 April 2001 and on that day rejected the objection. The trial was then proceeded with the calling of three witnesses and was postponed to 25and 26 July 2001 as the investigation officer was on leave.

[4] On 20 April 2001, by a letter the defence counsel filed a petition to the High Court for a revision of the learned sessions court judge's decision rejecting the preliminary objection.

[5] On 16 July 2001, the High Court granted the stay of proceeding in the sessions court until the revision of sessions court decision is decided. Therefore, the case was postponed for mention on 15 October 2001.

[6] On 25 July 2001, the accused failed to attend court because he was sick and the accused's counsel produced a medical certificate. On the same day, the counsel for the two appellants informed the court that his clients wanted to discharge themselves as sureties. However, the accused's counsel submitted to the court that the application was not proper to be made at that stage as the accused was on sick leave. Therefore, the court fixed 5 September 2001 to hear the appellants's application to have the bond discharged.

[7] On 5 September 2001, the accused and counsel were absent. Thus, the DPP applied for a warrant of arrest to be issued against the accused and the

court allowed the application and ordered the notice to show cause to be issued against the two appellants to explain why bail should not be forfeited. 10 October 2001 was fixed as the mention date.

[8] On 10 October 2001, the appellants' counsel applied for an order that the bail bond be discharged and that there was no need to proceed with the show cause notices. The sessions court judge however, dismissed the application and fixed another mention date, 9 November 2001 for the show cause proceeding.

[9] On 13 October 2001, the show cause notices had been issued against the appellants regarding the failure of the accused to attend the court on 5September 2001.

[10] On 9 November 2001, the court fixed another date, 3 December 2001 for hearing of the show cause proceeding because the warrant of arrest against the accused had not been served.

[11] On 3 December 2001, the trial was postponed. After a few postponements, the court finally fixed 25 January 2002 as the new date. However on that date, the High Court had made a stay order as regard to all proceedings in connection to the charge against the accused. Therefore, the case was again postponed.

[12] On 22 March 2002, the accused's counsel informed the court that the High Court had rejected the accused's application for revision and the appellants' counsel with the permission of the court discharged himself. The court then fixed 22 April 2002 as hearing date to hear the show cause notices.

[13] On the hearing date, 22 April 2002, the appellants' counsel posed two preliminary objections as regard to the proceedings and it was answered by the DPP on 17 July 2002 and on 29 July 2002 the court rejected both of the objections. The show cause proceeding was then fixed on 29 August 2002.

[14] On that day, the first appellant gave the evidence that:

(a) She signed the bail bond and knew her duties as bailor.

(b) She had known the accused for the past five years through the second appellant. However, she never went to the accused's house even though she knew the accused's address.

(c) She did not know the accused's telephone number and never contacted the accused.

(d) Normally, the accused was the one who contacted her and every time he did so she would remind the accused about the court appointments. She also met the accused two times at the KLCC.

(e) The last time the accused called her was on the night of 24 July 2001. She reminded the accused about the next hearing date but the accused got angry and threatened to hurt her and to destroy her property.

(f) After the accused did not attend court she lodged a police report the next day and on 27 July 2001, she lodged another police report. A

(g) The money which was deposited in court was hers alone and she is a homemaker with two kids.

[15] The second appellant gave the evidence that: B

(a) The money belongs to the first appellant.

(b) Before 25 July 2001, he never met the accused and spoke to the accused only once.

(c) In the conversation, the accused uttered vulgar words towards him. C

(d) In November 2001, he went to the accused's village in Georgetown but failed to find him.

[16] On 26 September 2002, the learned sessions court judge had ordered that the sum of RM5,000 be forfeited and the balance returned to the first appellant. D

[17] The court forfeited the bail bond on the ground that the accused failed to appear in court on 5 September 2001 and the appellants failed to give sufficient evidence as to why the bail could not be forfeited. E

THE LAW

Discharge of Bond

[18] Section 393 (4) of the Criminal Procedure Code (CPC) provides, a surety may at any time arrest the person on whose behalf the bond was entered into and forthwith bring him before a court which shall thereupon discharge that surety's bond and shall call upon that person to find other sufficient sureties and, if he fails to do so, shall commit him to custody. F

[19] But s 393 (1) provides, in the alternative that when any person is required to execute a bond with sureties, any person who has entered into such a bond as surety may at any time apply to a court to discharge the bond either wholly or so far as relates to the applicant. G

[20] This application for a discharge which may be made at any time may be made for whatever reason or for no reason at all than the desire to be relieved from further liability. Little demonstration is needed to prove that the existence of reasons or lack of reasons is immaterial. Under s 393 (4), where the surety arrests with a view to causing a discharge, the court shall discharge without more; and that must mean that no reasons will be asked by the court. H

[21] And, therefore, it follows that to infer from the application of discharge that there must be circumstances raising the likelihood of the accused absconding would be wrong. I

[22] On the appearance of such person pursuant to the warrant or on his voluntary appearance the court shall direct the bond to be discharged either wholly or so far as relates to the applicant and shall call on that person to find other sufficient sureties and, if he fails to do so, may commit him to custody.

THE FORFEITURE PROCEEDINGS

[23] Where the accused fails to appear in accordance with the bond or otherwise breaches a condition in the bond, proceedings can be brought to enforce payment under the bond. These proceedings depend in the first place on proof of forfeiture of the bond to the satisfaction of the court.

[24] Normally, whether breach has occurred is a relatively simple matter. If the terms of bail require the accused to attend on a stipulated date in court, and there being no further change of the date of hearing, the accused fails to appear, a breach will clearly have occurred.

[25] At the same, whether proof is straightforward or not, 'evidence should be led producing the actual bail bond and stating that the bailors were the actual persons who entered into the bond'. But as the non-appearance of the accused on the date of hearing will be obvious to the trial court before which the accused was to appear, that court's record of the absence of the accused on the date of hearing will be sufficient evidence; *Khor Ewe Suan v PP* [1964] MU 220.

[26] If the date of hearing was not fixed in the bail bond itself, but was notified to the accused and his bailors, there must be proof that notice of the date of hearing was indeed sent to the bailors to produce the accused on the scheduled date; *Fateh Chand Wadhumal v Emperor* 41 Cr LJ 802.

[27] If there is no proof of this, it cannot be said that a breach has occurred justifying forfeiture. So if a bailor has no notice of the date of hearing, she cannot be held responsible for failing to produce the accused on the scheduled date; *PP v Chou Tai Chuan* [1988] 1 MLJ 511 at 513.

SHOW CAUSE

[28] However the proof of forfeiture does not *ipso facto* lead to payment of the penalty stipulated in the bond. Section 404 (1) CPC provides that the court has a discretion as to the course of action. It may summon the surety and call upon him to pay the penalty. The bailors should be invited to go into the witness box and state their case, if they so wish, calling any further evidence which they require; *Khor Ewe Suan v PP* [1964] MLJ 220; *Ramlee v PP* [1969] 1 MLJ 42 at 43.

DISCRETION

[29] The court's discretion is two-fold. It may call upon the surety to show cause and in those proceedings; it may remit any portion of the penalty and enforce payment of part of it.

SUFFICIENT CAUSE

[30] What sufficient cause is has not been defined.The circumstances of each case must be appraised. Sufficient cause is not the same thing as a satisfactory explanation; and in such proceedings the question should be whether there is sufficient cause shown, not whether the explanation given by the sureties or bailors is a satisfactory one; *Ramlee v PP* [1969] 1 MLJ 42.

[31] The court begins with the premise that the obligations of a surety are very serious and not meant to be undertaken lightly. There is an obligation on a surety to be fully satisfied that he or she can meet the liability which will arise if the accused person does not surrender to his bail. This failure to surrender is not a theoretical possibility, though a surety may think it is. Arrested persons have frequently not surrendered. There is a real risk to be undertaken. So again let no one think that they can simply appear before the magistrates and tell some hard luck story, whereupon the magistrates will say, 'well, be more careful in future'; *R v Waltham Forest Justices; ex p Parfrey* [1980] Cr LR 571.

[32] Accordingly, the burden of proof in show cause is very heavy. Only in the most exceptional cases will the court be prepared to modify the *prima facie* rule which is that the amount for which the person concerned has stood surety will be forfeited in full; *R v Knightsbridge Crown Court* [1980] Cr LR 715.

[33] Thus, there cannot be sufficient cause if the surety never took the trouble to ensure that the accused would appear on the date stipulated in court. The surety is not required to do what is superhuman; but at the least he must have been diligent in undertaking his obligations. He must have made diligent attempts to remind the accused of the date of appearance and seek an assurance from him that he would be appearing.

[34] I now turn to specific points:

(a) Question of discharge and release from the bond. Whenever a bailor or surety makes an application to be released of his or her bond, the person to be released has to be brought before the presiding magistrate and in this case the judge of the sessions court. There is no question of discharge being effected in the absence of the person for whom the bail has been entered. On 25 July 2001 it is clear from the records that the judge declined to discharge on an account of a sick certificate. Unfortunately there is nothing to indicate how genuine the sick certificate on whether it was a forged or false sick certificate. (Page 26 of the rekod rayuan).

[35] While the bailors were already concerned about the possibility of the bailee absconding which eventually proved to be true and probably that was his intention all along, the records show that on 25 July 2001 the bailors were present, defence counsel was present and therefore I do not accept the argument that both bailors or defence counsel had no notice that there was a date fixed for the hearing of the application to discharge. It cannot therefore be contended that the sessions court judge chose to ignore the application to discharge.

[36] On 5 September 2001 the records show that this time the bailors were present but the bailee/accused and defence counsel were not present. This showed how irresponsible the accused person was. On the part of the bailors it could not be contended that their responsibility had lapsed on 25 July 2001 unless and until the bailee was brought to court, the liability under the bail bond was not released. There was no explanation for the absence of defence counsel.

[37] The bailors must have been misled or entertained a mistaken belief of the law that the liability was discharged on 25 July 2001. Between 25 July 2001 and 5 September 2001 nothing was shown about efforts made to-secure the attendance of the bailee between 25 July 2001 and 5 September 2001. The court then ruled that the warrant of arrest was to be issued. Henceforth I note that the hearing for the notice to show cause for forfeiture of the bail was later postponed unfortunately due to the numerous applications being made. And on 10 October 2001, it is noted at p 200 of the record 'waran tangkap dikeluarkan dan OKT telah hilang diri'. Due to the numerous intervening applications and proceedings which were oscillating, it was not until 25 September 2002 that he hearing on the notice to show cause was heard.

[38] With regard to the notice it is not defective for the reason that on 25July 2001 the bailors knew very well that they were to be present on 5September 2001.

[39] Page 19 of the record of appeal showed that the accused person and the bailors were notified of attendance on 25 July 2001 and as already noted above, it cannot be said that the bailors had no notice that they had to be present in court on 5 September 2001 and had the responsibility of producing the accused for this burden cannot be shifted to the court as this will open the gates for bailors and bailees to circumvent the bail conditions. In any event if the accused was indeed absconding it cannot be said that defence counsel had relinquished responsibility and the bailors were not acting in breach of the conditions of the bond for failing to secure the attendance of the accused person on 5 September 2001. With regard to the question of proof of the bail bond the non-appearance of the accused on the date of hearing which was 25 July 2001 will be obvious to the court before which the accused was to appear and the court's record of the absence of the accused on the date of hearing constitutes sufficient evidence.

[40] With regard to the bail bond I do not accept that two bonds are necessary. Both the bailors have signed the one copy of the bond and have been present to request for discharge. It is therefore untenable to say that at this stage that two forms should have been issued. If there is any irregularity there I hold that it has not occasioned a failure of justice.

[41] I therefore have to consider the actual proceeding on the notice to show cause (paras 11–17).

[42] In my view however, the breach of the bond must be viewed on a material date, the date being 5 September 2001 when the bailors knew that they have to be present in court on 5 September 2001 and still had the responsibility of securing or at least attempting to secure the attendance. However, it is noted that prior to 25 July 2001 the bailors had made attempts to remind the accused of his attendance. I am of the view that the first appellant had completely entrusted her belief on the second appellant that the accused was a reliable person.

[43] The circumstances of the case are made even more unfortunate that on the basis of being a long friendship that the first appellant is being punished for her belief. On record I find the second appellant had made some attempts to contact the accused before 25 July 2001. In my view even if the first appellant had herself gone to Penang, the facts showed that from 5 September 2001 the accused manifested no intention to appear.

[44] In my view the delay had also been caused by the various interlocutory applications for revision and hearing on preliminary objections which gave the accused even greater opportunity to abscond. Therefore it is proper to ask whether sufficient reason had been shown. I am of the view that there are circumstances to consider what is a fair amount to be forfeited. The first appellant being bound should realize that the obligation of a surety is very serious. I take into account however the rights of the bailors could be mitigated by the circumstances that on record there was also delay in the warrant of arrest being issued. The matter is unfortunate as some of the delay is not attributed to the bailors' efforts. There were postponements granted either on account of defence counsel or the prosecution. In my view the proceeding on the question of the bail should not have been overshadowed by preliminary objections. The actual date for determination therefore is whether sufficient reason had been shown on 5 September 2001 arising out of the failure of attendance on 25 July 2001.

[45] On these grounds I therefore hold that the amount of RM5000 that has been forfeited be set aside and be substituted with an amount of RM2500. The first appellant is therefore to be refunded for the amount of RM2500.

Appeal allowed.

Reported by AG Kalidas